

Detainee Bill Shifts Power to President



Jamie Rose for The New York Times

Speaker J. Dennis Hastert, with other Congressional leaders, signing the detainee treatment bill Friday.

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WASHINGTON, Sept. 29 — With the final passage through Congress of the detainee treatment bill, President Bush on Friday achieved a signal victory, shoring up with legislation his determined conduct of the campaign against terrorism in the face of challenges from critics and the courts.

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Rather than reining in the formidable presidential powers Mr. Bush and Vice President [Dick Cheney](#) have asserted since Sept. 11, 2001, the law gives some of those powers a solid statutory foundation. In effect it allows the president to identify enemies, imprison them indefinitely and interrogate them — albeit with a ban on the harshest treatment — beyond the reach of the full court reviews traditionally afforded criminal defendants and ordinary prisoners.

Taken as a whole, the law will give the president more power over terrorism suspects than he had before the Supreme Court decision this summer in *Hamdan v. Rumsfeld* that undercut more than four years of White House policy. It does, however, grant detainees brought before military commissions limited protections initially opposed by the White House. The bill, which cleared a final procedural hurdle in the House on Friday and is likely to be signed into law next week by Mr. Bush, does not just allow the president to determine the meaning and application of the Geneva Conventions; it also strips the courts of jurisdiction to hear challenges to his interpretation.

And it broadens the definition of “unlawful enemy combatant” to include not only those who fight the United States but also those who have “purposefully and materially supported hostilities against the United States.” The latter group could include those accused of providing financial or other indirect support to terrorists, human rights groups say. The designation can be made by any “competent tribunal” created by the president or secretary of defense.

In very specific ways, the bill is a rejoinder to the *Hamdan* ruling, in which several justices said the absence of Congressional authorization was a central flaw in the administration’s approach. The new bill solves that problem, legal experts said.

“The president should feel he has better authority and direction now,” said Douglas W. Kmiec, a conservative legal scholar at the [Pepperdine University](#) School of Law. “I think he can reasonably be confident that this statute answers the Supreme Court and puts him back in a position to prevent another attack, which is the goal of interrogation.”

But lawsuits challenging the bill are inevitable, and critics say substantial parts of it may well be rejected by the Supreme Court.

Over all, the legislation reallocates power among the three branches of government, taking authority away from the judiciary and handing it to the president.

Bruce Ackerman, a critic of the administration and a professor of law and political science at [Yale University](#), sharply criticized the bill but agreed that it strengthened the White House position. “The president walked away with a lot more than most people thought,” Mr. Ackerman said. He said the bill “further entrenches presidential power” and allows the administration to declare even an American citizen an unlawful combatant subject to indefinite detention.

“And it’s not only about these prisoners,” Mr. Ackerman said. “If Congress can strip courts of jurisdiction over cases because it fears their outcome, judicial independence is threatened.”

Even if the Supreme Court decides it has the power to hear challenges to the bill, the Bush administration has gained a crucial advantage. In adding a Congressional imprimatur to a comprehensive set of procedures and tactics, lawmakers explicitly endorsed measures that in other eras were achieved by executive fiat. Earlier Supreme Court decisions have suggested that the president and Congress acting together in the national security arena can be an all-but-unstoppable force.

Public commentary on the bill, called the Military Commissions Act of 2006, has been fast-shifting and often contradictory, partly because its 96 pages cover so much ground and because the impact of some provisions is open to debate.

“This bill is about so many things, and it’s a mixed bag,” said Elisa Massimino, the Washington director of Human Rights First, a civil liberties group.

Ms. Massimino’s group and others criticized the bill as a whole, but she agreed with the Republican senators who negotiated for weeks with the White House that it would ban the most extreme interrogation methods used by the [Central Intelligence Agency](#) and the military.

“The senators made clear that waterboarding is criminal,” Ms. Massimino said, referring to a technique used to simulate drowning. “That’s a human rights enforcement upside.”

The debate over the limits of torture and the rules for military commission dominated discussion of the bill until this week. Only in the last few days has broad attention turned to its redefinition of “unlawful enemy combatant” and its ban on habeas corpus petitions, which suspects have traditionally used to challenge their incarceration.

Law professors will stay busy for months debating the implications. The most outspoken critics have likened the law’s sweeping provisions to dark chapters in history, comparable to the passage of the Alien and Sedition Acts in the fragile years after the nation’s founding and the internment of Japanese-Americans in the midst of World War II.

Conservative legal experts, by contrast, said critics could no longer say the Bush administration was guilty of unilateral executive overreaching. Congressional approval can cure many ills, Justice Robert H. Jackson wrote in his seminal concurrence in *Youngstown Sheet and Tube Company v. Sawyer*, the 1952 case that struck down [President Harry S. Truman](#)’s unilateral seizure of the nation’s steel mills during the Korean War.

Supporters of the law, in fact, say its critics will never be satisfied. “For years they’ve been saying that we don’t like Bush doing things unilaterally, that we don’t like Bush doing things piecemeal,” said David B. Rivkin, a Justice Department official in the administrations of [Ronald Reagan](#) and [George H. W. Bush](#).

How the measure will look decades hence may depend not just on how it is used but on how the terrorist threat evolves. If a major terrorist plot in the United States is uncovered — and surely if one succeeds — it may vindicate the Congressional decision to give the government more leeway to seize and question those who might know about the next attack.

If the attacks of 2001 recede as a devastating but unique tragedy, the decision to create a new legal framework may seem like overkill. “If there is never another terrorist attack and we never obtain actionable intelligence, this will look like a huge overreaction,” said Gary J. Bass, a professor of politics and international affairs at [Princeton](#).

Long before that judgment arrives, legal challenges are likely to bring the new law before the Supreme Court. Assuming the justices rule that they retain the power to hear the case at all, they will then decide whether Congress has resolved the flaws it found in June or must make another effort to balance the rights of accused terrorists and the desire for security.

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